

DEC 22 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID B. LINDER,

Plaintiff - Appellant,

v.

JOHN E. POTTER, Postmaster General,
United States Postal Service,

Defendant - Appellee.

No. 07-35496

D.C. No. CV-05-0062-FVS

MEMORANDUM *

Appeal from the United States District Court
for the Eastern District of Washington
Fred Van Sickle, District Judge, Presiding

Argued and Submitted October 23, 2008
Seattle, Washington

Before: SILVERMAN and BERZON, Circuit Judges, and MAHAN, District
Judge.**

Following cross-motions for summary judgment, the district court held that
Plaintiff David Linder's mental impairment did not substantially limit his ability to

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The Honorable James C. Mahan, United States District Judge for the
District of Nevada, sitting by designation.

perform the major life activities of thinking and concentrating and granted summary judgment in favor of Defendant John Potter. We reverse on this narrow issue..

As part of his Rehabilitation Act claim, Linder must show that he suffers a physical or mental impairment that substantially limits his ability to perform major life activities. *Gribben v. United Parcel Serv., Inc.*, 528 F.3d 1166, 1169 (9th Cir. 2008). We disagree with the district court's ruling that Linder failed to present a triable issue on whether his limitations were substantial.

First, the court should not have required Linder to present ““more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial.”” (ER Tab 93, at 13 (quoting *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052 (9th Cir. 2005)).) *Wong*'s heightened standard applies only when the record as a whole renders the plaintiff's disability claim implausible. *See Gribben*, 528 F.3d at 1170 n.2. Unlike the plaintiff in *Wong*, Linder has not achieved unusual success in spite of his impairment. *See Wong*, 410 F.3d at 1065-66. Nothing about Linder's case “makes a disability finding implausible and necessitates a higher evidentiary burden.” *See Gribben*, 528 F.3d at 1170 n.2.

Second, Linder provided sufficient evidence of substantiality of impairment to survive a summary judgment motion. Linder's doctor, Dr. Smith, noted that Linder suffered from intrusive flashbacks and an inability to solve workplace

problems. Dr. Smith rated the severity of Linder's symptoms of "recurrent recollection" and "reliving trauma" a 10/10 and 8/10 respectively on the pertinent diagnostic scale. Further, Linder told a different doctor that difficulties at work preoccupied him and interfered with his conscious thought about three to five times a day, causing "angry and depressive ruminations that would last around fifteen to twenty minutes."

This evidence, in the context of Linder's other medical evidence and his own statements concerning the effect of his limitations, create a genuine issue of material fact as to whether his limitations are substantial.

_____ We decline to exercise our discretionary review of the district court's denial of plaintiff's motion for partial summary judgment and therefore do not reach any of the other issues raised in plaintiff's brief on appeal. *See Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 877 n.1 (9th Cir. 2002) (citing *Jones-Hamilton Co. v. Beazer Materials and Serv.*, 973 F.2d 688, 693-694 n.2 (9th Cir 1992)).

Accordingly, the judgment of the district court is **REVERSED**. We **REMAND** for further proceedings.